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In The

Supreme Court of the United States

JANUARY TERM, 1981

JAMES R. KURTZ,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

Whether constitutional double jeopardy provisions prohibit retrial after the trial Court dismisses an accusatory instrument of the defendant's own motion, after jeopardy has attached, for the reason that the prosecution failed to make an adequate opening statement as required by §260.30 of the New York Criminal Procedure Law.

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JAMES R. KURTZ,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

James R. Kurtz, the petitioner herein, prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York.

OPINIONS BELOW

The petitioner's trial and subsequent dismissal of the information against him occurred in the City Court of Watertown, New York before a Judge and Jury. The opinion of the trial Judge on the motion for dismissal is unreported and is printed in Appendix A hereto, *infra* pg. A-1.

The opinion of the County Court for Jefferson County, New York which affirmed the ruling of City Court and reversed the ruling in part is reported at 101 Misc 2d 964 and is printed in Appendix A hereto *infra* pg. A-5.

The New York Court of Appeals affirmed the action of the County Court on November 25, 1980 although Associate Judge Jones wrote dissent, concurred in by Judges Fuchsberg and Meyer, which is unreported to date, the order of Affirmance and the dissent are printed in Appendix A hereto, *infra* pg.A-8.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1980 (Appendix A, *infra* pg. A-8).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

Whether constitutional double jeopardy provisions prohibit retrial after the trial Court dismisses an accusatory instrument of the defendant's own motion, after jeopardy has attached, for the reason that the prosecution failed to make an adequate opening statement as required by §260.30 of the New York Criminal Procedure Law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> . . .Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . .

STATEMENT OF THE CASE

On March 2, 1979 petitioner was arrested and charged with Speeding and Driving while Intoxicated, a misdemeanor both in violation of sections 1192 and 1180 of the New York State Vehicle and Traffic Law.

§1192 (2):
Whoever operates a motor vehicle or motorcycle while in an intoxicated condition or while his ability to operate such motor vehicle is impaired by the use of a drug as defined in this chapter shall be guilty of a misdemeanor and shall be punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both. Whoever operates a motor vehicle or motorcycle while in an intoxicated condition after having been convicted of operating a motor vehicle or motorcycle and whoever operates a motor vehicle or motorcycle while his abaility to operate such motor vehicle is impaired by the use of a drug, as defined in this chapter, after having been convicted of operating a motor vehicle or motorcycle while his ability to operate such motor vehicle is impaired by the use of a drug as defined in this chapter shall be guilty of a felony and shall be punishable by imprisonment for not less than sixty days nor more than two years or by a fine of not less than two hundred dollars nor more than two thousand dollars, or by both such imprisonment and fine. For the purposes of this section a prior conviction for operating a motor vehicle or motorcycle while in an intoxicated condition or while one's ability to operate a motor vehicle is impaired by the use of a drug as defined in this chapter shall be limited to those convictions had within ten years of the time of the instant alleged offense.

§1192 (3):
Upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person arrested for operating a motor vehicle or motorcycle while in an intoxicated condition or while ability to operate is impaired by the consumption of alcohol, the court may admit evidence of the amount of alcohol in the defendant's blood taken within two hours of the time of the arrest, as shown by a medical or chemical analysis of his breath, blood, urine or saliva. For the purposes of this section (a) evidence that there was, at the time, five-hundredths of one percentum, or less, by weight of alcohol

> in his blood is prima facie evidence that the defendant was not in an intoxicated condition; (b) evidence that there was, at the time, more than five-hundredths of one per centum and less than fifteen-hundredths of one per centum by weight of alcohol in his blood is relevant evidence, but it is not to be given prima facie effect, in indicating whether or not the defendant was in an intoxicated condition; (c) evidence that there was, at the time, ten-hundredths on one per centum, or more, by weight of alcohol in his blood, may be admitted as prima facie evidence that the defendant's ability to operate a motor vehicle or motorcycle was impaired by the consumption of alcohol; (d) evidence that there was, at the time, fifteen-hundredths of one per centum, or more, by weight of alcohol in his blood, may be admitted as prima facie evidence that the defendant was in an intoxicated condition.

At the trial a jury was drawn and sworn and the prosecutor delivered his opening statement. Immediately thereafter, petitioner's counsel moved to dismiss the information on the ground that the people's opening statement was inadequate as a matter of law. After arguments in chambers, the trial court reserved decision. The trial continued over the objection of the prosecutor who mentioned that he could amplify his statement, but he never moved to so do. After one witness testified, the trial recessed for the day. The following day after further arguments in chamber, the trial Judge dismissed the information on the ground that the prosecutor's opening statement was insufficient as a matter of law and further held that the prosecutor could not resubmit the charge due to double or former jeopardy.

On December 6, 1979, the Jefferson County Court affirmed the dismissal but reversed as to double or former jeopardy and remanded the case to the Watertown City Court for a new trial. On November 25, 1980 the New York Court of Appeals affirmed that judgment with opinion. (Appendix A, *infra* pg.A-8.)

Both the County Court decision and the decision of the Court of Appeals agreed with the trial Court that the prosecutor's opening statement was inadequate as a matter of law.

RAISING THE FEDERAL QUESTION

The Petitioner in his motion for dismissal in City Court raised the Constitutional question of double jeopardy, inasmuch as his motion was after the first juror was sworn.

The City Judge agreed with petitioner's claim of Constitutional double jeopardy. The petitioner reasserted these federal Constitutional claims in the Jefferson County Court which nevertheless reversed that portion of the City Court decision.

The petitioner reasserted these federal Constitutional claims in the New York Court of Appeals which nevertheless affirmed the County Court. However, Associate Judge Jones in a dissent joined in by Judges Fuchsberg and Meyer protested:

> Retrial is now barred by the double jeopardy clause (Appendix A, *infra* pg.A-16.)

And the majority stated:

> We must now determine whether defendant's retrial is prohibited by the doctrine of double jeopardy (Appendix A, pg. A-12.)

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with and in defiance of this Court's rulings on the doctrine of double jeopardy.

Petitioner stands in the position of having to stand trial on a charge for which he has been formerly in jeopardy. That determination is so patently at odds with the controlling decisions of this Court and is so serious a threat to the continuing vitality of those decisions as to call for immediate corrective action.

The Fifth Amendment protection which cloaks this petitioner from prosecution after having been placed in jeopardy is made abundantly clear in *Burks* v. *United States* 98 S. Ct. 2141, 437 US 1; *Greene* v. *Massey*, 98 S. Ct. 2151, 437 US 19; *Sanabria* v. *United States* 98 S. Ct. 2170, 437 US 54; *United States* v. *Scott* 98 S. Ct. 2187, 437 US 82.

The key factor in this case is given, the premises that the prosecutor's opening statement was inadequate and that the trial Judge dismissed the case on its merits, is that trial Court determination an adjudication on the facts going to guilt or innocence of this petitioner?

At a minimum the prosecutor should set forth the nature of the charge against the accused and state briefly the facts he expects to prove, along with evidence he plans to introduce in support of the same and that prosecutor does not make such a statement does not the trial Court then make a determination of the facts? For the prosecutor cannot introduce at trial what he does not say in his opening. Why else would the Court of Appeals say the trial Court "should have permitted the prosecutor to supplement his opening to the jury"? Why supplement or amend what is unnecessary?

Since the prosecution would be barred from introducing evidence of the crime charged, the prosecution failed to supply any evidence to prove the essential elements of the crime, the petitioner was denied due process of law requiring the granting of this petition.

Once a reviewing Court has determined that the evidence introduced or to be introduced at trial was insufficient to sustain the verdict, a re-trial is precluded. See *Burks* v. *United States*, *supra*.

In any event, the petitioner cannot be made to stand trial again as the trial Court made a ruling on the merits, "I therefore

find that this is a final determination... and that a resubmission is precluded."

The New York Courts have either refused to give effect to the rulings of this Court or they have misinterpreted the importance of these decisions. This Court has said:

> When a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous. (*Sanabria* v. *U.S.* 98 S. Ct. 2170, 437 US 54)

As in Sanabria, the trial Court here found the description of the offense too narrow to warrant the admission of certain evidence. Even assuming that ruling was erroneous, there was an acquittal for insufficient evidence.

> That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the court and hence bars appellate review of the trial Court's error. (*Sanabria* v. *U.S., supra*)

The decision below will be taken by the New York prosecutors as a signal that this Court's prior decisions respecting the Fifth Amendment protections to persons placed once in jeopardy need not be respected or followed.

The situation is thus one where the New York Courts and the New York prosecutors need to be reminded that the constitutional standards and protections in this area have not been relaxed or repealed.

CONCLUSION

For these various reasons, this petition for a Writ of Certiorari to review the judgment of the New York Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF WATERTOWN CITY COURT

IN CHAMBERS:

THE COURT: This is a decision on Mr. McClusky's motion to dismiss for failure to properly open on behalf of the prosecutor. This is a serious motion that goes to the heart of this particular case in my opinion, and I have asked counsel to do research. They have. I thank them. We've had long discussions concerning it. First of all, I would like to read the predecessor to the present Criminal Procedure Law, Section 260.30(3), which is the Code of Criminal Procedure, Section 388(1). Along with the heading sentence that reads as follows: "The jury having been impaneled and sworn, the trial must proceed in the following order: 1) The District Attorney or other counsel for the People must open the case." As enacted and is still true to date, the Criminal Procedure Law which supplanted the Code of Criminal Procedure, particular Section 260.30(3), together with the head sentence reads as follows: "The order of a jury trial in general is as follows: 3) The People must deliver an opening address to the jury." I do not find any significant different in the two statutes wherein the District Attorney's duties are set forth at either greater or lesser length. I find them practically identical, and therefore for that reason I believe that portion of the law which pertained to Section 338(1) in the nature of cited cases is probably still good law and applies to Section 260.30(3) of the Criminal Procedure Law. To that end I will quote Pitler's, The New York Criminal Practice at Page 640, Section 12.31. "The CPL requirement for an opening statement by the People continues the practice prescribed by Subdivision 1 of Section 388 of the Code of Criminal Procedure." And at Page 641 I again quote, "Pre-CPL decisions seem to require that facts constituting the crime had to be set forth in the opening address." I now quote again from an authoritative, see Zett, New York Criminal Practice, Volume 6 at Page 44072, Paragraph 44.101, "Thus, the opening statement should be designed to acquaint the jury with

the nature of the case and the issues of fact involved." On Page 44-72 under Paragraph 44.102, and I will again quote, "Additionally he is" – referring to the prosecutor – "advised to detail significant facts which support the allegations made in the indictment or information." Continuing, "The prosecutor during his opening statement is advised to make an affirmative statement of ultimate facts to protect against the defense motion to dismiss after the People's opening statement on the grounds of failure to state a prima facie case." Subdivision B at Page 44-72 I'll further quote from. "It has been held that the purpose of the People's opening statement is to afford the jury a preview of issues for their further understanding and to allow them to more intelligently follow the evidence that is adduced to trial. In short, the opening constitutes the prosecution's introduction of the case to the jury and is a capsulized view of the evidence to be presented." I heard yesterday originally the prosecutor's opening statement and yesterday I had our stenographer read it back to me. For purposes of this decision, within the last twenty minutes I had it read back to me again. I find from the law that I have just cited and other authorities cited to me this morning that under the guidelines given by these authorities the prosecutor's address or opening to the jury was insufficient and I grant the motion to dismiss on that ground. I will further add – and I am now referring to the case of People against Coppa at 394 Supp. 2nd, 219, at Page 222 – There is no jurisdiction in this Court to entertain the appeal – this was in my own words now. This was later commented on and reversed by the Court of Appeals, but the following statement was not mentioned by the Court of appeals: "And a resubmission of the matter to the grand jury is precluded by Subdivision 4 of CPL 210.20. That states in fact, 210.20(4), "Upon dismissing an indictment or a count thereof upon any of the grounds specified in Paragraphs a, b, c, and i of Subdivision 1, the Court may upon application of the People in its discretion authorize the People to submit the charge or

charges to the same or another grand jury. When the dismissal is based upon some other ground, such authorization may not be granted. In the absence of authorization to resubmit, the order of dismissal constitutes a bar to any further prosecution of such charge or charges by indictment or otherwise, in any criminal court within the county." And elsewhere in the Criminal Procedure Law in relation to informations — and I refer to Section 170.45 of the Criminal Procedure Law and other areas as well — I firmly believe that the motion to dismiss this information based on that section and on others is controlled by Section 210.20, and I therefore find that this is a final determination, outside of any rights of appeal, that the People have, and that a resubmission is precluded by Section 210.20(4) and the Coppa case. I will therefore at this time, Gentlemen, excuse the jury.

MR. McCLUSKY: Thank you, Judge.

(In Open Court at 12:09 p.m., Court resumes. Mr. Harberson not present.)

THE COURT: I note the prosecutor is not here. I don't know where he is. Mr. McClusky, do you want to see if he intends to come in?

MR. McCLUSKY: I think he might have left, Judge.

(Mr. McClusky left courtroom and returned momentarily.)

MR. McCLUSKY: He's gone, Judge.

THE COURT: All right, I will proceed in any event so I will not unduly delay the jury. Ladies and Gentlemen, I apologize for holding you up this morning. I want to advise you that the reason for the delay was that I had to consider some serious questions of law which were raised by the attorneys in Chambers. I have done that and as a result of my consideration of the law I have decided to dismiss the case at this time on a question

of pure law. It has nothing in fact to do with any deliberations that were going to be put to you and it has nothing to do with you as jurors. That is my prerogative and you'll recall when I gave you your instructions that certain prerogatives were mine and certain prerogatives were yours, and I chose to exercise mine. Under the circumstances, the charge now being dismissed, you're still on the jury panel and I believe that your next time for appearance in this Court is on Monday morning. I do not believe we'll have another case ready for you until then. So thank you very much for being here and for your service and for your many hours. You appeared to be very attentive and we appreciate that. We'll see you back here Monday morning at 10 o'clock. Court's in recess.

(At 12:13 p.m., Court recessed.)

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DECISION OF JEFFERSON COUNTY COURT

STATE OF NEW YORK

COUNTY COURT JEFFERSON COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

Appellant

-vs-

JAMES R. KURTZ,

Defendant-Respondent.

Decision 79-1766

APPEARANCES:

JAMES C. HARBERSON, JR.
Assistant District Attorney

WILLIAM J. McCLUSKY, ESQ.
Attorney For Defendant

AYLWARD, J:

This proceeding is an appeal by the People from an order of the trial court dismissing the accusatory instrument after the trial had commenced with the taking of some testimony, because of the inadequacy of the prosecutor's opening statement.

Trial of this issue commenced with the selection of a jury. At the end of the prosecutor's opening statement defense counsel moved to dismiss claiming that the opening statement was inadequate as a matter of law. Argument was held in chambers and the trial judge reserved decision. The trial continued with the taking of testimony. The following day, the prosecutor moved to reopen and defense counsel objected since testimony had been taken. The trial court denied the prosecutor's motion to reopen

and then rendered its decision dismissing the case because of the inadequacy of the opening statement.

The present Criminal Procedure Law and the former Code of Criminal Procedure require the prosecutor to make an opening statement. There are not any statutory guidelines as to what constitutes an adequate opening statement.

This court has reviewed the opening statement and concurs with the trial court that the prosecutor's statement was insufficient in that it failed to state any facts constituting the crime of Driving While Intoxicated which the prosecutor intended to prove. However, there does not appear to be any bad faith on the part of the prosecutor in his failure to make an adequate opening.

The court's allegiance is both to the People and to the defendant — on behalf of the defendant to see that he receives a fair trial, on behalf of the People to see that the defendant does not escape a just verdict because of a technicality which may be correctable and which does not dispose of the issue of guilt or innocence on the merits.

This court disagrees with the trial procedure that ensued after the defendant made his motion to dismiss. The trial court should have decided that motion prior to the taking of testimony and in the event that the trial court determined that the opening statement was insufficient, it should have permitted the prosecutor to reopen.

In the instant case and because of the delayed decision, the trial court should have granted the prosecutor's motion to reopen and declared a mistrial pursuant to CPL §280.10(3), if necessary. Defendant's counsel contributed to the dilemma in consenting to the procedure whereby the trial continued with the taking of testimony prior to the court's decision on defendant's motion and by defense counsel urging the prosecutor to agree to that procedure.

Decision of Jefferson County Court

The next issue is whether or not the defendant will be placed in double jeopardy in the event a retrial is ordered.

This trial was aborted by the defendant's motion to dismiss. The order of dismissal by the trial court was not a determination of defendant's guilt or innocence since the determination was not based on the merits of any evidence presented during the trial. The order of dismissal simply decided that the People had erred procedurally in failing to comply with CPL Section 260.30(3).

While jeopardy had attached with the selection of a jury, there does not appear to be any basis to hold that the defendant will be placed twice in jeopardy upon a retrial since it was the defendant's motion that concluded the trial proceedings prior to an evidentiary determination on the merits. *People v. Key*, 45 NY2d 111, *Burks v. United States*, 98 SCt 2141, 2148, 2149.

In dismissing the accusatory instrument, the trial court improperly relied on §CPL 210.20(h). Motions for dismissal under that subsection must be made within forty-five days of arraignment and are essentially pre-trial motions.

This appeal to this intermediate appellate court is authorized by *People v. Coppa*, 45 NY2d 244, because of the trial court's reliance on CPL §210.20, even though it was an erroneous reliance.

The judgment is reversed and the matter remanded to the City Court of Watertown for a new trial.

This decision is made solely on the law and constitutes the order of this court.

Dated: December 6, 1979

/s/ John V. Aylward
Jefferson County Judge

OPINION OF THE NEW YORK COURT OF APPEALS
(Majority)

STATE OF NEW YORK
COURT OF APPEALS

CoCt No. 540

The People &c.,

Respondent,

v.

James R. Kurtz,

Appellant.

(540)William J. McCluskey, Adams, for appellant.

Lee Clary, DA, Jefferson County (Donald R. Gerace of counsel) for respondent.

JASEN, J.:

This appeal presents the issue whether constitutional or statutory double jeopardy provisions prohibit retrial after the trial court dismisses the accusatory instrument on the defendant's own motion for the reason that the prosecutor failed to make an adequate opening statement as required by Criminal Procedure Law section 260.30.

On March 2, 1979, the defendant was arrested and charged in a simplified traffic information with speeding and driving while intoxicated. (Vehicle and Traffic Law, §§ 1180, 1192.) On June 20, 1979, trial was held in City Court, City of Watertown. After the jury was selected and sworn, the prosecutor delivered his opening statement. Immediately thereafter, defense counsel moved to dismiss the information on the ground that the People's opening statement was inadequate as a matter of law. After arguments were heard in chambers, the trial court reserved decision on the motion. Over the objection of the

prosecutor, who offered to amplify any inadequacies in his opening, the trial continued at the behest of defense counsel. After one witness had testified, the trial was recessed for the afternoon. The following day, the prosecutor moved for permission to supplement his opening statement to the jury. Defense counsel objected to this motion on procedural grounds. Shortly thereafter, the trial court denied the prosecutor's motion to supplement his opening and then dismissed the information on the ground that the prosecutor's opening statement to the jury was insufficient as a matter of law.

On appeal, County Court, Jefferson County, reversed and remanded the case to City Court for a new trial. While County Court agreed with the trial court that the prosecutor's opening statement was inadequate in that it failed to state any of the facts constituting the offenses which the prosecutor intended to prove, County Court disapproved of the procedure utilized by the trial court subsequent to the defendant's motion to dismiss. The court stated that the trial court should have determined the motion before allowing the trial to continue and, upon deciding the prosecutor's opening statement was inadequate, it should have permitted the prosecutor to supplement his opening to the jury. Finally, County Court rejected defendant's contention that a reversal and new trial was barred by the doctrine of Double Jeopardy. The court held that retrial was not precluded as "it was the defendant's motion that concluded the trial proceedings prior to an evidentiary determination on the merits." There should be an affirmance.

At the outset, we note our agreement with the determination reached by the courts below that the prosecutor's opening statement was inadequate. Criminal Procedure Law section 260.30, which sets forth the order of events in a criminal jury trial, provides that the "people *must* deliver an opening address to the jury." (CPL § 260.30, subd 3 [emphasis supplied].) This

opening statement should be a capsulized version "of the evidence that [the prosecutor] expects to present, and the claim that he will make with reference thereto, to the end that the jury, upon listening to the evidence, may better understand and appreciate its connection and bearing upon the case." (*People* v *Benham*, 160 NY 402, 434; see also *People* v *Wade*, 35 AD2d 401, 403; *People* v *Oakley*, 10 AD2d 457, 459, revd on other grounds 9 NY2d 656; see generally 3 Wharton's Criminal Procedure, § 493; 23A CJS, Criminal Law, § 1085.) Moreover, we have held that the prosecutor's opening statement can neither be waived (*People* v *Levine*, 297 NY 144, 147; *People* v *McLaughlin*, 291 NY 480, 483; but cf. *People* v *Rivara*, 33 AD2d 567), nor does the reading of a short indictment constitute an adequate opening to the jury (*People* v *Levine*, *supra*, at pp 146-147).

Although the Criminal Procedure Law does not specify the requisite contents of the prosecutor's opening statement, at a minimum the prosecutor generally should set forth the nature of the charge against the accused and state briefly the facts he expects to prove, along with the evidence he plans to introduce in support of the same. (See *People* v *Benham*, 160 NY 402, 434, *supra*; *People* v *Wade*, 35 AD2d 401, 403, *supra*.) In this case, the opening statement merely consisted of a brief summary of the evidence to be introduced and a listing of the names of the witnesses who were to testify. The prosecutor failed in all respects to delineate the particular offenses with which the defendant was charged and how these charges were to be proven. Such an incomplete recitation simply fails to satisfy the statutory requirement that the prosecutor make an opening statement to the jury. (CPL § 260.30, subd 3, *supra*.) That is not to say that the prosecutor must reveal all the evidence he intends to offer during the trial, but certainly the jury should hear sufficient evidence to intelligently understand the nature of the case they have been chosen to decide.

Opinion of the New York Court of Appeals
(Majority)

We also are in agreement with County Court's conclusion that the trial court erred in allowing the trial to proceed without first disposing of the defendant's motion to dismiss. The trial court should have ruled on the motion and given the prosecutor the opportunity to correct the deficiency before proceeding with the trial. In failing to do so, the trial court abused its discretion.

Although heretofore we have not passed directly upon the propriety of a dismissal following an incomplete opening by the prosecutor, we have stated that "absent bad faith or undue prejudice, a trial will not be undone" simply because there was some defect in the prosecutor's opening to the jury. (*People* v *DeTore*, 34 NY2d 199, 207, cert den 419 US 1025.) Moreover, although a trial court can no doubt direct acquittal based on the prosecutor's opening statement, this should be done only upon an affirmative showing that the prosecutor is not entitled to a conviction because the charge cannot be sustained under any view of the evidence and then only after the prosecutor has been given an opportunity to correct the deficiency in his opening. (See *People* v *Coppa*, 57 AD2d 189, 192, revd on other grounds 45 NY2d 244; *People* v *Handford*, 40 AD2d 529.) Indeed, the overwhelming majority of courts faced with such motions to dismiss have adopted the view that they should be denied unless it clearly appears from the opening statement that the defendant cannot be lawfully convicted and then only after the prosecutor has been made aware of the difficulty and fails or is otherwise unable to correct it. (See, e.g., *Hanley* v *United States*, 416 F2d 1160, cert den 397 US 910; *United States* v *Dietrich*, 126 F 676; *Chatman* v *State*, 164 Ind App 97; *State* v *Gray*, 423 SW2d 776 [Mo 1968]; see generally Ann., Power of Trial Court to Dismiss Prosecution or Direct Acquittal on Basis of Prosecutor's Opening Statement, 75 ALR3rd 649.)

In this case, the prosecutor's opening statement, although incomplete, did not contain any information that would indicate

that the charges against the defendant could not be sustained, such as facts constituting a complete defense. (*United States* v *Dietrich*, 126 F 676, *supra*.) Rather, the only deficiency in the opening statement was that it did not adequately amplify the charges against defendant and the facts to be proven in support thereof. Moreover, before dismissing the information, the trial judge not only failed to inform the prosecutor of the nature of the defect in his opening, but denied him the opportunity to correct this deficiency before permitting the trial to go forward. As County Court concluded, such action was an abuse of discretion, contrary to law.

The better practice concerning such motions directed at the adequacy of the prosecutor's opening statement would be that a motion should be made immediately after the prosecutor has completed his opening to the jury. The trial court should then inform the prosecutor of the nature of the defect, if any, and afford him an opportunity to rectify it. If the prosecutor is unable to do so, then the motion to dismiss the accusatory instrument must be granted. Under no circumstances should the court allow the trial to proceed without first ruling on the motion. As mentioned earlier, it was the belated disposition of the motion which has created the difficulty in this case, a problem which should be avoided in all other cases. However, our analysis does not end here for now we must determine whether defendant's retrial is prohibited by the doctrine of Double Jeopardy.

In this state, a defendant's right not to be twice put in jeopardy for the same crime is protected by the double jeopardy clauses of the Federal and State Constitutions as well as by statutory double jeopardy provisions. (U S Const, 5th amdt; N Y Const, art I; CPL § 40.20.) Specifically, as the doctrine of Double Jeopardy has developed in New York in relation to midtrial dismissals, "reprosecution is permitted whenever a dismissal has

been granted on motion by defendant, so long as the dismissal does not constitute an adjudication on the facts going to guilt or innocence [even where] dismissal occurs after jeopardy has attached." (*People* v *Key*, 45 NY2d 111, 117.) Indeed, in its most recent excursion into the Double Jeopardy area, the Supreme Court has implicitly approved of this approach. (See *Burks* v *United States*, 437 US 1; *Greene* v *Massey*, 437 US 19; *Sanabria* v *United States*, 437 US 54; *United States* v *Scott*, 437 US 82; see also *Swisher* v *Brady*, 438 US 204.) As presently constituted under this recent line of cases, the doctrine distinguishes between trial orders terminating the trial in the defendant's favor prior to any determination of guilt or innocence and those orders which terminate the trial based on evidentiary insufficiency. (*Burks* v *United States*, *supra*, at pp 14-18; *United States* v *Scott*, *supra*, at pp 94-99.) Because a dismissal based on insufficient evidence is tantamount to an acquittal, reprosecution is precluded in the latter category of cases. (See, e.g., *People* v *Mayo*, 48 NY2d 245.) Retrial of cases falling within the former category of dismissals, however, is permissible because "the defendant, by deliberately choosing to seek termination of the proceeding against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause". (*United States* v *Scott*, *supra*, at pp 98-99; cf. *People* v *Barley*, 47 NY2d 965.)

In the case before us, the trial court dismissed the action on defendant's motion solely because of the insufficiency of the prosecutor's opening statement. As mentioned earlier, this dismissal was not premised on any evidentiary determination that the People were not entitled to a conviction or that the prosecutor had acted in bad faith by deliberately delivering an incomplete opening in order to terminate the trial over defendant's objection. (Cf. *Illinois* v *Sommerville*, 410 US 458; *Hall* v *Potoker*, 49 NY2d 501; *People* v *Michael*, 48 NY2d 1.) Rather,

dismissal here was the result of the trial court's misconception of the requirements of subdivision 3 of Criminal Procedure Law section 260.30 and occurred without any evaluation on the trial court's part as to the factual elements of the offenses with which defendant was charged.[1] Inasmuch as this dismissal, erroneous as it was, in no sense resembles an acquittal of the defendant and indeed appears functionally indistinguishable from the declaration of a mistrial (see *Lee* v *United States*, 432 US 23, 31), retrial of defendant is prohibited neither by the double jeopardy clauses of the State and Federal Constitutions nor by the statutory double jeopardy provisions.

This is not to say that retrial will be permitted whenever the trial terminates on the defendant's motion based on the inadequacy of the prosecutor's opening statement. Where, for instance, the prosecutor in his opening statement clearly and deliberately admits a fact which defeats all possibility for conviction and the case is then dismissed, retrial on the same charge would be forbidden because there has been a determination involving the factual innocence of the accused.[2] Since here there

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[1]Unlike the dissent, we place no reliance on the trial court's characterization of the dismissal herein. Whatever the trial court may have envisioned with respect to the possibility of reprosecution is irrelevant for as our decision in *People* v *Key* (45 NY2d 111, 119, *supra*) clearly states: "[A] Trial Judge's interpretations of the double jeopardy clause should not determine whether appeal and retrial are permissible. It is the nature of the order, and not the Trial Judge's views on double jeopardy, that should govern."

[2]Such a dismissal would indeed be rare. As one commentary has pointed out, "if the prosecutor, defense counsel, and the court discharge their pretrial discovery responsibilities, it would appear next to impossible for a case to come to trial in which the prosecutor might be forced to admit, in his opening statement, the truth of a fact which constitutes a complete defense." (Ann., Power of Trial Court to Dismiss Prosecution or Direct Acquittal on Basis of Prosecutor's Opening Statement, 75 ALR3d 649, 656, *supra*.)

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(Dissent)**

was no such determination in the prior trial, the doctrine of Double Jeopardy does not prohibit the People from again trying defendant for the offenses with which he is charged.

Accordingly, the order of the County Court, Jefferson County, should be affirmed.

People v Kurtz
No. 540

JONES, J. (dissenting):

In my view the constitutional mandate that "no person shall be * * * subject for the same offense to be twice put in jeopardy of life or limb" requires a reversal of the order of County Court in this case and the dismissal of the accusatory instrument.

Defendant moved to dismiss on the People's opening, after jeopardy had attached (CPL 40.30, subd 1, par [b]; *Crist* v *Bretz*, 437 US 28). The motion was granted on the ground that "the prosecutor's statement was insufficient in that it failed to state any facts constituting the crime of Driving While Intoxicated which the prosecutor intended to prove", i.e., specifically, that there was no statement with respect to proof of intoxication. Conceptually this must be likened to the granting of a motion, on the defendant's application made at the close of the People's case, for a trial order of dismissal on the ground that the trial evidence is not legally sufficient to establish the offense charged (CPL 290.10, subd 1). The dismissal, terminating the trial proceedings in defendant's favor, was "an adjudication on the facts going to guilt or innocence" (*People v Key*, 45 NY2d 111, 117). It was expressly predicated on a determination with respect to the sufficiency of the People's proof; it was not a termination

of the trial on grounds unrelated to factual guilt or innocence. While the majority ascribes to CPL 260.30 the effect of requiring the prosecution to "adequately amplify the charges against defendant and the facts to be proven in support thereof", it refuses to regard the trial court's dismissal on the ground that the prosecution's statement was defective as to facts to be proved as an evaluation by the trial court "as to the factual elements of the offenses with which defendant was charged" — which appears to me to be a patent inconsistency.

That the dismissal was thought by the trial court to be on the factual merit of the People's case is apparent. In granting defendant's motion to dismiss the trial court also considered the possibility of reprosecution of the charge and concluded, "I therefore find that this is a final determination, outside of any rights of appeal that the People have, and that a resubmission is precluded by Section 210.20(4) * * *."[1] Thus, to the extent that the characterization of the dismissal by the trial court may be relevant, it is clear in this instance that the dismissal was not "in contemplation of" a second prosecution (*People v Key*, 45 NY2d 111, 119, *supra*).

Accordingly, retrial is now barred by the double jeopardy clause (see *United States v Scott*, 437 US 82, 96-101; cf *Finch v United States*, 433 US 676).

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[1]That section 210.20 applies to indictments rather than to felony complaints does not detract from the clarity of the trial court's intention in this case.

* * *

Order affirmed. Opinion by Jasen, J. All concur except Jones, J., who dissents and votes to reverse in an opinion in which Fuchsberg and Meyer, JJ., concur.

Decided November 25, 1980

REMITTITUR

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

CoCt No. 540

The People &c.,

Respondent,

v.

James R. Kurtz,

Appellant.

The appellant in the above entitled appeal appeared by William J. McClusky; the respondent appeared by Lee Clary, District Attorney, Jefferson County.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Jasen, J. All concur except Jones, J., who dissents and votes to reverse in an opinion in which Fuchsberg and Meyer, JJ., concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Watertown City Court, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 25, 1980